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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS
FOR
THE STATE OF TEXAS

WILLIAM ROGERS,
APPELLANT,

VS.

THE STATE OF TEXAS,
APPELLEE.

FILED
COURT OF CRIMINAL APPEALS
10/12/2017
DEANA WILLIAMSON, CLERK

On Appeal in Appellate Cause No. 13-15-00600-CR;
Originally in Trial Court Cause No. 2013-4-5466 in the
24th Judicial District Court of Refugio County, Texas;
Hon. Juergen "Skipper" Koetter, Judge Presiding.

BRIEF OF APPELLANT, WILLIAM ROGERS

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October 10, 2017
ORAL ARGUMENT DENIED

IDENTITY OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 38.1(a), the parties to the suit are as follow:

APPELLANT	**WILLIAM ROGERS**
APPELLEE	**THE STATE OF TEXAS**
TRIAL JUDGE	**HON. JUERGEN "SKIPPER" KOETTER**
STATE'S ATTY AT TRIAL:	**HON. RAYMOND J. HARDY** **HON. REID MANNING** Assistant District Attorneys Refugio County Courthouse Refugio, TX 78377
DEFENSE ATTYS AT TRIAL:	**HON. GENE GARCIA** Attorney-at-Law 809 S. Port Corpus Christi, TX 78405 **HON. ALLEN C. LEE** Attorney-at-Law 810 Oriole Corpus Christi, TX 78418
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Hon. Juergen "Skipper" Koetter, Judge Presiding

BRIEF OF APPELLANT, WILLIAM ROGERS

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, **WILLIAM ROGERS,** Appellant in this matter, and respectfully submits this BRIEF OF APPELLANT after the granting of his Petition for Discretionary Review. This appeal comes to this court following the judgment of the 13th Judicial District Court of Appeals' affirming the judgment and sentence imposed in the trial court after convicting Appellant of the offense of "Burglary of

a Habitation" a Second Degree Felony, with a first degree punishment range.

This appeal originally arises from the 24th Judicial District Court of Refugio County, Texas, the Honorable Juergen "Skipper" Koetter, Judge Presiding, in District Court Cause Number 2013-4-5466, in which the Appellant, **WILLIAM ROGERS**, was the Defendant and the **STATE OF TEXAS** was the Plaintiff. For purposes of this brief, **WILLIAM ROGERS** shall be referred to as "Appellant" and the **STATE OF TEXAS**, as the "State."

I.

STATEMENT OF THE CASE

Appellant was charged in two indictments after an incident that occurred at the alleged victim's home. In Tr. Ct. Cause No. 2013-4-5466, Appellant was charged with "Burglary of a Habitation." Appellant elected to go to trial before a jury. After evidence and argument was presented by both parties to the jury, Appellant was found guilty and convicted of "Burglary of a Habitation." The convicting jury sentenced Appellant to forty (40) years in the Texas Department of Criminal Justice-Institutional Division, a fine and court costs.

II.

STATEMENT OF PROCEDURAL HISTORY

Appellant was formally charged with Burglary of a Habitation by written

indictment filed with the Refugio County District Clerk on, or about, April 9, 2013. [CR-8].

On, or about, November 30, 2015, the Assistant Refugio County District Attorney read the indictment aloud to the jury, but only Paragraph B of Count I, to which Appellant entered a plea of "Not Guilty." [RR-IX-6-7].

Appellant's trial continued until December 3, 2015, when the jury delivered a verdict of "Guilty" as to Count I, Paragraph B. [RR-XII-95-96].

On, or about, December 3, 2015, the punishment phase of the trial began. [RR-XIII-1]. Both sides presented evidence to the jury and rested and closed. [RR-XIII-37]. The jury assessed forty (40) years imprisonment in the Texas Department of Criminal Justice. [RR-XIII-38; CR-294].

The Trial Court indicated in its "Trial Court's Certification of Defendant's Right of Appeal" that this matter was not a plea bargain case, and that Appellant had the right to appeal. [CR-326].

Appellant's Notice of Appeal was timely filed. [CR-298].

Following briefing in this case, the Honorable 13th Court of Appeals denied oral argument and considered Petitioner's appeal by submission. The Honorable 13th Court of Appeals issued an opinion on, or about, March 9, 2017, affirming Appellant's conviction in Tr. Ct. Cause No. 2013-4-5466; App. Cause No. 13-15-

00600-CR and vacating and dismissing the conviction in Tr. Ct. Cause No. 2013-4-5468; Cause No. 13-15-00601-CR.

A motion for rehearing was timely filed on, or about, March 24, 2017. Petitioner's motion for rehearing was denied on, or about, April 19, 2017.

Appellant filed a Petition for Discretionary Review in this matter on, or about, May 19, 2017.

On or about August 23, 2017, this Honorable Court of Criminal Appeals granted Appellant's petition for discretionary review, as to ground three only, and indicated that it would not permit oral argument.

On, or about September 22, 2017, an extension for the filing of this brief was granted by this Honorable Court of Criminal Appeals in this matter until October 9, 2017.

III.

RECORD BEFORE THE COURT

The Clerk's Record consists of one (1) volume. The Clerk's Record will be cited using the abbreviation "CR" referring to the Clerk's Record followed by the appropriate page number. For example, page three of the Clerk's Record will be cited as [CR-3].

The Reporter's Record furnished to Appellant consists of fourteen (14)

volumes, including exhibits. The Reporter's Record will be cited using the abbreviation "RR," followed by a numeral to indicate the appropriate page number(s). For example, page four of volume five of the Reporter's Record will be cited as [RR-V-4].

IV.

STATEMENT OF FACTS

During the trial, Appellant testified as to the events of the encounter leading to his indictment. Appellant, William Henry Rogers, testified on his own behalf during his trial. Appellant is a forty-six year old owner of a crude oil hauling trucking company. [RR-XI-108]. On the date of the incident at the Watson residence, Appellant went to the home, walked in the front door, let himself in and turned off the alarm to the residence. [RR-XI-117]. He went to feed the cats and testified that he had done so previously in the same manner as he described for the jury. [RR-XI-119]. Appellant opened the back door and put one foot out the door. [RR-XI-120]. He went back into the house to close the freezer door, when he saw the alleged victim walking down the front walkway. [RR-XI-122]. Appellant immediately turned around to the back door which he had just left and tried to open it. [RR-XI-123]. Appellant couldn't get it open. [RR-XI-123].

Appellant next went to what he called "Sandra's sanctuary." [RR-XI-123].

Appellant testified that he went over to a window that Sandra Watson had showed him in the past that was her escape route out of the house where some hurricane shutters had been removed from the bottom. [RR-XI-125]. He was not able to get out so he went from the window to a closet. [RR-XI-125]. He entered the closet and about that time the alleged victim entered the front of the house. [RR-XI-126].

Appellant testified that he was in the closet and was very cramped because of the clothing and shoes.

After listening for an opportunity to flee, Appellant testified that he saw that the light coming in the closet dims and he realized that something was blocking a path for the light to come into the closet. [RR-XI-130]. Appellant testified that the dimming of the light was the alleged victim, David Watson, jumping in front of the door holding a knife shouting "You" very loudly. Appellant testified that Mr. Watson was in a "linebacker stance," with his knees bent and he was moving the knife up and down in his right hand. [RR-XI-130-131].

Upon seeing Mr. Watson, Appellant was startled and took about a half a step back. [RR-XI-131]. Mr. Watson started coming in the closet. Appellant reached for a gun that was on top of a safe located in the closet. [RR-XI-132]. Appellant testified that he did not put the gun there, the gun being a PK380 that he did not own. [RR-XI-133].

Bringing up the gun straight, the alleged victim struggled with Appellant and as Appellant felt his hand grabbed, he pulled the trigger. [RR-XI-134]. Immediately following, Appellant could not step back any further and he reached for the knife that was coming up higher at that point. [RR-XI-134]. The alleged victim immediately stopped, let go, and stepped back. [RR-XI-134]. Mr. Watson stepped outside the closet and exited. [RR-XI-134].

Appellant got to the door jam and he saw the alleged victim in front of him and the alleged victim was bringing up his weapon. [RR-XI-135]. Mr. Watson's other hand was going for the gun. *Id.* Appellant was nicked slightly above the belly with the knife. [RR-XI-136].

Prior to the jury receiving the charge, Appellant requested instructions on necessity and self-defense. All the requests were denied by the Trial Court. [CR-269-273]

V.

ISSUE GRANTED FOR REVIEW AND PRESENTED

GROUND FOR REVIEW:

Did the 13th Court of Appeals err in the analysis of "harm" in this case and in finding any error harmless?

VI.

SUMMARY OF THE ARGUMENT

Appellant testified at his own trial and his testimony established the right to request defensive instructions in the jury charge. The Trial Court did not believe that Appellant was entitled to a self-defense nor a necessity instruction, and clearly tried to limit Appellant's defense claims at trial. The failure to give Appellant the requested instruction was reversible error as to the Burglary charge in this case and Appellant was harmed by the failure to include defensive instructions as the jury was left with no vehicle to acquit him. Such failure resulted in some harm. The 13th Court of Appeals' opinion and analysis does not demonstrate that all harm was abated, nor that it was "harmless." As such, Appellant is entitled to a new trial during which his defense can be evaluated and a jury can be properly instructed to consider his justification defenses.

VII.

BRIEF OF THE ARGUMENT

GROUND FOR REVIEW RESTATED:

Did the 13th Court of Appeals err in the analysis of "harm" in this case and in finding any error harmless?

I. STANDARD OF REVIEW AND APPLICABLE LAW

A. STANDARDS OF REVIEW APPLICABLE IN THIS MATTER.

1. GENERAL STANDARDS WITH RESPECT TO REQUESTED DEFENSIVE ISSUE CHARGES.

A trial court is required to submit a jury charge that sets out the law applicable to the case. TEX.CODE CRIM. PROC. ANN. art. 36.14. A trial court is required to instruct the jury on statutory defenses, affirmative defenses, and justifications when they are raised by the evidence and requested by the defendant. *Walters v. State,* 247 S.W.3d 204, 208-09 (Tex.Crim.App.2007). A defendant is entitled to an instruction on self-defense if the issue is raised by the evidence, whether that evidence is strong or weak, unimpeached or contradicted, and regardless of what the trial court may think about the credibility of the defense. *Ferrel v. State,* 55 S.W.3d 586, 591 (Tex.Crim.App.2001); *accord Granger v. State,* 3 S.W.3d 36, 38 (Tex.Crim.App.1999). "Raised by the evidence" means "there is some evidence, from any source, on each element of the defense that, if believed by the jury, would support a rational inference that th[e] element is true." *Shaw v. State,* 243 S.W.3d 647, 657-58 (Tex.Crim.App.2007). The purpose of this rule is to ensure that the jury, not the trial court, decides the relative credibility of the evidence. *Id.* at 655. Defensive issues may be raised by the testimony of any

witness. *VanBrackle v. State,* 179 S.W.3d 708, 712-13 (Tex.App.-Austin 2005, no pet.). In determining whether the testimony raised a defensive theory, the evidence is viewed in the light most favorable to the defendant. *Id.* The defendant's testimony alone may be sufficient to raise the defensive theory requiring that the court submit a charge on that defense. *Hayes v. State,* 728 S.W.2d 804, 807 (Tex. Crim. App. 1987); *Dyson,* 672 S.W.2d at 463; *Warren v. State,* 565 S.W.2d 931, 934 (Tex. Crim. App. 1978). In determining whether the testimony of a defendant raises an issue of self-defense, the truth or credibility of the defendant's testimony is not at issue. *Rodriquez v. State,* 544 S.W.2d 382, 383 (Tex. Crim. App. 1976); *Halbert v. State,* 881 S.W.2d 121, 124 (Tex. App.-Houston [1st Dist.] 1994, pet. ref'd).

A reviewing court's first duty in analyzing a jury-charge issue is to decide whether error exists. *Barrios v. State,* 283 S.W.3d 348, 350 (Tex.Crim.App.2009) (citing *Ngo v. State,* 175 S.W.3d 738, 743 (Tex.Crim. App.2005)). A trial court's decision to deny a defensive issue in a jury charge is reviewed for an abuse of discretion. *See Westbrook v. State,* 29 S.W.3d 103, 122 (Tex.Crim.App.2000).

In this case, Appellant's testimony clearly establishes that he was faced with a situation where he was confronted by David Watson, the alleged victim, with a knife. The knife's use, or intended manner of use, as described by Appellant

clearly establishes that the knife was used as a deadly weapon by the alleged victim. This threat was not only immediate or theoretical; Appellant was injured by the knife. Appellant's testimony also clearly establishes that he reached for a gun while in the closet in order to defend himself from the threat that he perceived. This testimony entitled Appellant to a jury instruction on self- defense and necessity, which he requested in writing and was denied by the Trial Court. *See* [CR-269-273].

The opinion in this case acknowledged that "Appellant admitted to committing aggravated assault in his testimony…". *Rogers v. State*, 13-15-00600-CR and 13-15-00601-CR, page 6-7, (Tex. App.—Corpus Christi, opinion issued on March 9, 2017); *see also id.*, page 5 ("By this testimony, appellant essentially admitted to the offense of aggravated assault."). Because Appellant preserved the error, the Court of Appeals was required to reverse if there was ***some*** harm. Unless all harm was abated, appellant suffered some harm. *Miller v. State*, 815 S.W.2d 582, 586, n.5 (Tex Crim. App. 1991).

2. STANDARD OF REVIEW FOR ANALYZING ERROR WITH RESPECT TO JURY CHARGE ERROR IN THIS CASE.

If error exists, a reviewing court must determine whether the error caused sufficient harm to warrant reversal. *Ngo,* 175 S.W.3d at 743-44. Because

Appellant's trial counsel properly objected at trial, the 13th Court of Appeals was obligated to determine whether "the error appearing from the record was calculated to injure" his rights, i.e., whether there was "some harm." *Id.; Almanza v. State,* 686 S.W.2d 157, 160 (Tex.Crim.App.1984); *see* TEX.CODE CRIM. PROC. ANN. art. 36.19 (West 2006). Again, unless all harm was abated, appellant suffered some harm. *Miller v. State*, 815 S.W.2d 582, 586, n.5 (Tex Crim. App. 1991). Without a defensive instruction, the Trial Court essentially decided the credibility of the defense without allowing the trier of fact to evaluate it as requested by the defendant. This harm warrants the reversal of the conviction in this case and remand for a new trial.

II. THE 13TH COURT OF APPEALS ERRED IN THE ANALYSIS OF "HARM" IN THIS CASE AND IN FINDING ANY ERROR HARMLESS.

Citing *Reeves*, the Honorable 13th Court of Appeals evaluated Appellant's preserved error for harm by looking at the entire jury charge, the state of the evidence, the arguments of counsel, and any other relevant information in the record. *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013). In *Reeves*, this Honorable Court of Criminal Appeals stated the following:

> If, however, the defendant did object at trial, then he will obtain relief if the record shows that he suffered "some harm." This analysis requires a reviewing court to consider: (1) the jury charge as a whole, (2) the

> arguments of counsel, (3) the entirety of the evidence, and (4) other relevant factors present in the record. This less-stringent standard still requires the reviewing court to find that the defendant "suffered some actual, rather than merely theoretical, harm from the error." In the past, we have sometimes stated that the *defendant* must prove that he suffered "some harm." That is not accurate. Neither the State nor the defendant has a burden to prove harm. In *Almanza,* we stated,
>
> > If the error in the charge was the subject of a timely objection in the trial court, then reversal is required if the error is "calculated to injure the rights of defendant," which means no more than that there must be *some* harm to the accused from the error. In other words, an error which has been properly preserved by objection will call for reversal as long as the error is not harmless.
>
> We adhere to that standard.

Reeves v. State, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013)(*internal citations omitted*). The 13th Court of Appeals erred in its analysis under the factors cited in *Reeves* and in ultimately finding any error was "harmless."

1. Factor One: The jury charge as a whole.

As for the jury charge, despite a proper request for defensive instructions, the charge in this case did not contain a defensive instruction of any sort. The absence of any defensive instructions was harmful because the missing instructions left the jury completely without a vehicle by which to acquit Appellant. This Court

of Appeals has previously opined that the absence of an instruction on a confession-and-avoidance defense such as a self-defense or justification "is generally harmful because its omission leaves the jury without a vehicle by which to acquit a defendant who has admitted to all the elements of the offense." *Cornet v. State*, 417 S.W.3d 446, 451 (Tex. Crim. App. 2013).

Although the Court of Appeals cites *Reeves* in the opinion, the facts of this case contrast to those in *Reeves* in at least one important respect. In *Reeves*, the appellant received the benefit of an instruction on self-defense, however the *Reeves* decision analyzes how a provocation instruction limited the appellant's self defense instruction in the jury charge. This clearly raises the question: If harm resulting in reversal can be present even when the self-defense instruction is given, but improperly limited, then how can the harm resulting from the complete failure to include the instruction ever be harmless? In this particular case and with respect to this factor, there is nothing to analyze to support the Court of Appeals' decision and analysis. There was nothing to review because the instruction was never in the jury charge.

Clearly, if the instructions were warranted, the Trial Court had no discretion and thus erred, the charge was erroneous and resulted in harm. This factor weighs in Appellant's favor.

2. Factor Two: The arguments of counsel.

With respect to Appellant's reliance on self-defense and necessity, the record supports that Appellant's trial counsel attempted to rely on and urge self-defense and necessity during the *voir dire* and during Appellant's testimony but was shut down by the Trial Court. *see* [RR-VIII-13-15];[RR-XI-139-142]. The 13th Court of Appeals expressly acknowledged that the Trial Court granted the State's motion in limine prior to *voir dire* concerning justification defenses. *Rogers v. State*, 13-15-00600-CR and 13-15-00601-CR, page7, n.1 (Tex. App.—Corpus Christi, opinion issued on March 9, 2017). Upon being asked to reconsider the ruling prior to *voir dire*, the Trial Court expressly told Appellant's counsel he could not talk to the jury concerning self defense or justification. *id.* Again, during Appellant's direct examination, the Trial Court instructed Appellant's counsel he could not go into anything alluding to self-defense. *id.* Despite these rulings, the attempt to rely on a justification defense was made clear in Appellant's testimony at trial. This is important because, in the analysis of this case, the Honorable 13th Court of Appeals noted that appellant's trial counsel did not rely on either defense in concluding that the error in refusing to charge the jury was harmless. Appellant asks that the review in this case for harm be conducted in light of the reality of what the Trial Court's rulings did. Along these lines, Appellant points this Court

to *Gonzales v. State*. In *Gonzalez v. State*, the State argued that the appellant could not receive a self-defense instruction because she denied a role in the stabbing. In rejecting this argument, the 14th District Court of Appeals noted that the arguments of counsel were not evidence and recognized that it would come as no surprise that appellant denied a role in the stabbing during closing arguments. *Gonzales v. State*, 474 S.W.3 345, 350 (Tex. App.—Houston [14th Dist.] 2015). The 14th Court of Appeals wrote, "By that time, the trial court had already denied her requested instruction on self-defense. If the charge did not allow for a justification defense appellant could not reasonably argue to the jury that she did the stabbing and still expect to be acquitted." *id.* Here the same logic should apply. Appellant's counsel was forbidden by the Trial Court to discuss justification during *voir dire* and during Appellant's testimony. Ultimately, the Trial Court excluded the requested defensive instructions. Appellant's trial counsel was forced to work with the rulings of the Trial Court, much as the appellant's counsel had to in *Gonzales*. Despite the Trial Court's rulings, Appellant still managed to present enough evidence during the trial to warrant inclusions of the instructions he requested which appear to have been acknowledged by the Honorable 13th Court of Appeals. Put simply, regardless of the Trial Court's rulings attempting to exclude any self-defense or necessity during Appellant's trial, the evidence still warranted the

instructions requested by Appellant. This factor weighs in Appellant's favor as it does not support a finding of "harmless error."

3. Factor Three: The entirety of the evidence.

With respect to the evidence at trial, the Honorable 13th Court of Appeals acknowledged that, "The weight of the evidence for appellant's guilt, even if not overwhelming, suggests that the jury would not have accepted claims of self-defense or necessity." *Rogers v. State*, 13-15-00600-CR and 13-15-00601-CR, page 6, (Tex. App.—Corpus Christi, opinion issued on March 9, 2017). A defendant is entitled to an instruction on self-defense if the issue is raised by the evidence, whether that evidence is strong or weak, unimpeached or contradicted, and regardless of what the trial court may think about the credibility of the defense. *Ferrel v. State,* 55 S.W.3d 586, 591 (Tex.Crim.App.2001). Appellant requests reconsideration of the contested issues and the weight of the probative evidence in light of the fact that the analysis of this factor seems to address the credibility of Appellant's defense, something even a Trial Court may not do when deciding whether to grant the requested instruction or issues. Appellant also urges that such weighing of the probative evidence for purposes of harm results in speculating what the jury would have decided. The reality is that it cannot be guessed what a

jury would have done had the requested instructions or issues been included in the jury charge.

Nonetheless, looking at the evidence in this case, through the eyes of Appellant demonstrated by his own testimony is what he requested through his instructions. As cited in the Statement of Facts, Appellant clearly testified what he view, observed and how he acted in response to the events that transpired, including the presence of a knife that ended up inflicting injury upon him, an actual, not theoretical harm. The Trial Court precluded the jury from even considering it. Appellant believes that this factor weighs in his favor and does not support a finding that the error in this case was "harmless."

4. Factor Four: Other relevant factors present in the record.

The 13th Court of Appeals' opinion as to this factor revolves heavily, if not exclusively, upon the sentence imposed in this case. While acknowledging that the State requested a life sentence and the jury gave much less than a life sentence, the Court of Appeals analysis on this point, nevertheless gives great weight to the sentence in this case. This analysis is wrong for a few reasons. First, the question at punishment is not whether the defendant has committed a crime, but instead what sentence should be assessed. *See Haley v. State,* 173 S.W.3d 510, 515 (Tex. Crim. App. 2005)); *see also Ellison v. State,* 201 S.W.3d 714, 718 (Tex. Crim.

App. 2006). Second, as for the sentences in these cases, it cannot be denied that there were other factors that could have, and likely did, play a part in the amount of time assessed against Appellant. Third, having found Appellant culpable without the benefit of considering self-defense or justification, the jury was charged with assessing punishment for a first and second degree felony.

The punishment range for a 1st degree felony included a potential sentence of life in prison. Indeed, as the Court of Appeals pointed out, the State requested a life sentence. Further, a prior California conviction was introduced during Appellant's punishment hearing. Also, the record demonstrates that the alleged victim testified about his injuries and the impact following the incident made the basis of the two charges. [RR-XIII-7-10]; [RR-X-47-48].

In short, the jury could have determined punishment based upon the injuries suffered by the alleged victim, the previous California conviction presented and argued to the jury, the impact of the alleged victim's life, or the punishment ranges alone. Blameworthiness is not the only factor that results in the determination of punishment, if it should be considered at all. Appellant believes this factor weighs in his favor as well and does not support a finding that the failure to include the justification instructions was "harmless error."

VIII.

CONCLUSION AND PRAYER

WHEREFORE, for the reasons set forth above, Appellant submits that the Trial Court erred in denying his request for defensive instructions, and the 13th Court of Appeals erred in affirming the Trial Court's judgment. Appellant respectfully prays that, following the briefing of the matters raised in this brief, this Honorable Court reverse and remand the judgment and sentence below to the Trial Court for a new trial. In the alternative, Appellant respectfully prays that this Honorable court reverse and remand this case to the 13th Court of Appeals for further proceedings. Appellant further prays for general relief, and any other relief he is entitled to in law or in equity.

Respectfully Submitted,

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By:

_____

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State Bar No. 24010213
ATTORNEY FOR APPELLANT
WILLIAM ROGERS

IX.

CERTIFICATE OF COMPLIANCE

In accordance with Texas Rule of Appellate Procedure 9.4(i)(3), the undersigned, Luis A. Martinez, I hereby certify that the number of words in Appellant's Brief submitted on October 10, 2017, excluding those matters listed in Rule 9.4(i)(3), is 4, 092 words.

Luis A. Martinez

X.

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing document was served upon the persons below in the manner indicated on this 10th day of October, 2017, pursuant to the Texas Rules of Appellate Procedure.

Luis A. Martinez

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